United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2045

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P/S

ORIGINAL

To be argued by
ROBERT LEIGHTON

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA ex rel. GEORGE KING,

Petitioner-Appellant,

vs.

HON. THEODORE SCHUBIN, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY,

Respondent.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AND APPENDICES FOR PETITIONER-APPELLANT

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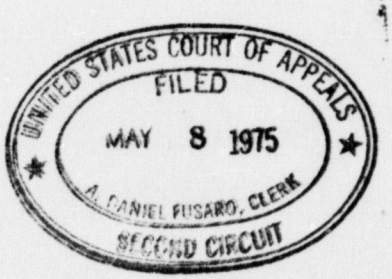

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex. rel. GEORGE KING, Petitioner-Appellant, -against- HON. THEODORE SCHUBIN, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY, Respondent.	DOCKET NO.: 75-2045

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Morris Lasker) dated October 22, 1974 dismissing appellant's application for a writ of habeas corpus. On December 11, 1974, Judge Lasker granted appellant's application for a certificate of probable cause and on January 27, 1975 also granted appellant permission to proceed in forma pauperis.

QUESTIONS PRESENTED

1. Whether appellant was deprived of his constitutional right to the effective assistance of counsel when the trial court refused to permit him a change of assigned counsel.

2. Whether the Court's refusal to grant appellant's request to recall the prosecution witnesses for further cross-examination, together with the Court's curtailment of his summation deprived appellant of his due process right to a fair trial.

STATEMENT OF FACTS

After a jury trial, appellant was convicted on May 12, 1972 in the Supreme Court, Kings County (Mangano, J.) of the crimes of attempted robbery in the second degree and attempted grand larceny in the third degree and was sentenced to a term of imprisonment not to exceed five years. The judgment of conviction was affirmed on appeal to the Appellate Division [41 A.D. 2d 1027 (2d Dept., 1973)] and on June 19, 1973, the Hon. Charles Breitel denied appellant's application for leave to appeal to the New York Court of Appeals.

In a petition for a writ of habeas corpus dated November 29, 1973, appellant maintained that he was being illegally detained as a result of the infirm conviction rendered against him on May 12,1973 in the Supreme Court, Kings County. Appellant claimed that the following errors of constitutional dimension were committed at his trial: First, he was denied his constitutional right to the effective assistance of counsel as guaranteed by the Sixth Amendment when the trial court refused his request to remove assigned counsel and substitute new assigned counsel; second, he was denied a fair trial when the Court refused to permit his counsel to comment on the presumption of innocence and reasonable doubt in his summation; and third, his due process right to a fair trial was further infringed when the Court would not permit him to recall three witnesses for additional cross-examination.

Specifically in support of his petition, appellant alleged that upon his arraignment on July 7, 1971 before the Hon. Hyman Barshay, Mr. Naden of the Legal Aid Society was assigned as his counsel and pleaded him not guilty.* When his trial commenced, he was represented by another attorney, a Mr. Nathanson, who was also employed by the Legal Aid Society. After the prosecution opened to the jury, but before appellant made any opening statement, the following colloquy took place in the Judge's chambers:

The Defendant:	I feel I should have another attorney representing me because my attorney and I have many discrepancies. I don't know how he feels about it, but this thing is no joke to me. This is real and I don't feel that the man is representing me properly.
The Court:	Do you have any money to hire a lawyer?
The Defendant:	No I don't.
The Court:	How long has this man been representing you and the Legal Aid Society?
The Defendant:	To my knowledge, for about sixteen days or better, which I have only seen him about three or maybe four occasions.
The Court:	Where have these occasions been?
The Defendant:	Right here in the building.
The Court:	On those occasions has he sat down and discussed your matter with you?

*It was appellant's contention that such a plea was contrary to his wishes, as he wanted to enter a plea of demurrer. (p. 2)

The Defendant: We have discussed it but you know he hasn't prepared no defense. There are motions I have filed. I might not have filed them properly. I am not a lawyer. I don't know certain things about the law, but when I asked for explanations, I got them. I don't get no answers to none of the questions. (pp. 2-3, T.14)*

The Court denied appellant's application for a new trial and was of the opinion that he was merely attempting to delay the trial. The Court further informed him that a new attorney would not be assigned, but that his Legal Aid attorney would be directed to sit beside him and give any advice that appellant might need. (p.3, T.14)

At that point, a conference was held between appellant and his assigned counsel and at the conclusion of this conference, appellant informed the Court that he would proceed pro se. Whereupon the Court in turn informed appellant that if he were to try the case himself, he would be bound by the rules of evidence and would have to cross-examine the witnesses against him. (pp. 3-4, T. 14-16) Appellant again protested:

> Your Honor, you see being I no confidence in him and he is showing no interest in the case, how can I turn to him and ask him questions. (p. 4, T. 17)

The Court again informed appellant that it was too late to re-assign him another lawyer and stated that appellant had produced no evidence that would show that his lawyer was incompetent. The Court reiterated its opinion that appellant was making this application only to delay the trial since the jury had already been selected. (p. 4, T.17-18)

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*Numerical references preceded by the prefix "p" refer to the pages of appellant's petition and numerical references preceded by the prefix "T" refer to the pages of the trial transcript.

Further colloquys then took place between appellant and the Court:

The Defendant: Your Honor, as I say nothing has been shown I can show the court in due respect . . .

The Court: You want to show me, go ahead.

The Defendant: I have letters received from the Legal Aid Department to explain they haven't been doing anything for me.

The Court: I don't know what you want done.

The Defendant: All I want to do is to be represented properly.

The Court: That is what they are going to do at this point. (p. 4, T-17-18)

At still another point, the following conversation took place:

The Defendant: There is still a discrepancy here, and maybe you can send another lawyer to set (sic) by me or something.

The Court: I have no control over the Legal Aid Society.

The Defendant: I can't go on with this lawyer.

The Court: You don't want Mr. Nathanson, he will be there for your advice.

The Defendant: Is there another lawyer other than Mr. Nathanson?

The Court: I have no control over the Legal Aid Society. They assign lawyers as they see fit.

The Defendant: Can the lawyer get me a lawyer?

The Court: I already told you that we will go ahead with this case, let's proceed. We will return to the Court room. (pp. 4-5, T. 20-21)

Accordingly, appellant proceeded to trial pro se, gave his own opening statement, and cross-examined all the prosecution's witnesses himself.

The People's case was predicated upon the testimony of the complainant, a taxi cab driver and the two arresting officers.

On May 13, 1971 at about 3:00 p.m., Pasquale Esposito, the complainant, was driving a medallion cab in Manhattan when he picked up appellant who directed him to go over the Williamsburg Bridge. Appellant told him that he was going to Marcy and Madison. (p. 5, T. 26) During the ride, appellant asked the complainant whether he had change for a ten dollar bill and when the complainant answered affirmatively, appellant directed him to make a left turn at Madison and then to pull over to the curb. The taxi, according to the complainant, was equipped with a glass partition through which the passenger is supposed to pay his fare. However, appellant got out of the taxi, and as he did, the complainant rolled up the window, leaving only a space of four to six inches through which appellant could pay his fare. Instead, appellant inserted a gun through this space and demanded that the complainant hand over his money. The complainant immediately attempted to roll up the window and appellant's gun fell to the floor of the cab. (p. 5, T-26-28)

In the interim, two police officers, Charles DiPiazzi and Kenneth G. Sullivan, were on a special assignment encompassing

taxi cab hold-ups. It was at the Brooklyn side of the Williamsburg Bridge that the officers first observed the taxi in which appellant was a passenger. They followed the cab to Madison Street and when it finally stopped at the curb, the Detectives stopped behind it and observed appellant leave the car. They then observed appellant walk over to the window on the driver's side and stick his arm through the window at which time they "saw something shiny in his hand pointed at the driver's head." According to the Detectives, appellant was apprehended with his arm still in the cab window. The pistol, which fired only blanks, was recovered from the floor of the cab. (pp. 7-8, T. 62-65)

Appellant, testifying in his own behalf, denied committing the crimes charged. According to appellant, he resided with his mother about a block away from Madison Avenue. On the day in question and at that specific time, he was sitting in a park near that location and began walking down Madison Street when he heard a squealing car. All of a sudden, the complainant pointed at him and two officers jumped out of their car with their guns drawn and placed him under arrest. (p. 10, T. 82-85)

Appellant in his petition further claimed that after he had cross-examined the Detectives, he had requested to recall the complainant and the two Detectives for further cross-examination.

Instead of permitting him to recall these witnesses, the Court inquired what questions appellant intended to put to these witnesses if they should be recalled. When appellant presented a list of questions to the Court (see Magistrate's report, A. 18), the Court responded that the questions were either repetitive or irrelevant. Accordingly, the Court denied his request to recall such witnesses.

When it was time for the summations to be given, the Legal Aid Counsel gave the summation in appellant's behalf and his summation, according to appellant, was improperly curtailed by the Court. In the beginning of the summation, his counsel stated:

> When a man is charged with the crime, he is not quite the same person he is before he was charged with the crime. You have a little different outlook at him. The very fact he is arrested, and he stands here accused of a crime places a stigma on him.

The Court interrupted counsel, telling him that he was making an unfair comment. (p. 16, T. 105) When his counsel then attempted to emphasize the importance of the presumption of innocence, he stated:

> What I wanted to bring out, he is innocent and he must remain innocent in your eyes. One of the disadvantages is that a defendant in a criminal case as opposed to a civil case, is usually required to set a money bail before . . . (p. 17, T. 105)

Again, the Court interrupted and directed counsel not to go any further into that subject.

Continuing with his summation, counsel stated:

> The accused is given two safeguards, that first safeguard is requiring the prosecution to prove his case beyond a reasonable doubt. The second safeguard that fits along with that, is the presumption of innocence. That means that also the prosecution on his own case, by himself, has proven . . . (p. 17, T. 106)

When counsel inquired whether he was being precluded from discussing reasonable doubt and the presumption of innocence, the Court responded that it was precluding counsel from telling the jury what the law was in this case. (p. 17, T. 106)

Thereafter, before the Court charged the jury, counsel made the following motion:

> Yes, Your Honor, during my summation, you pointed out that I was over-reaching my bounds in discussing the law and going into the province of the Court in its charge. Now it is the duty of defense counsel to establish at least a reasonable doubt based upon the evidence to the jury, and I feel unless I am able to explain my terms, what I mean by reasonable doubt, in pointing out what a reasonable doubt is, is pointless. Therefore, I move for a mistrial, on the ground that I was unduly restricted and limited in my summation. (p. 18, T. 120-21)

This motion was likewise denied and appellant maintained that restricting counsel in his attempt to discuss the facts as it pertained to the presumption of innocence and reasonable doubt prevented appellant from using the most "powerful weapon" in his endeavor to obtain an acquittal. (p. 18)

In answer to appellant's petition, the attorney general first maintained that appellant's application for a change of assigned counsel was made to delay the trial and further, that there was nothing in the record to show that his assigned counsel was not protecting his rights. In response to appellant's arguments that the Court unfairly restricted his counsel during summation,

the attorney general only responded that counsel was merely instructed not to go into matters of law which are properly the subject of the Court's charge to the jury. And finally, in reference to appellant's claim that he was unduly restricted in his cross-examination of the prosecution's witnesses, the attorney general maintained that the trial court's ruling was within the scope of its broad discretionary powers to control the scope of cross-examination.

In response to the attorney general's allegations, appellant claimed that the cases cited by the attorney general were not applicable to his case and again reiterated that he was denied his due process right to a fair trial by the commission of the aforementioned errors.

On October 22, 1974, the District Court dismissed appellant's application for a writ of habeas corpus. The Court's order and the opinion of the Magistrate is set forth in its entirety in the Appendix. (A. 4) It is from this ruling that appellant appeals to this Court.

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT REFUSED TO PERMIT HIM A CHANGE OF ASSIGNED COUNSEL.

At the outset of this case, before any testimony had been taken, appellant requested that the Court discharge his Legal Aid lawyer because he felt that Mr. Nathanson had not done anything for him and also because he lacked complete confidence and trust in this lawyer. The Court's denial of appellant's request at this time was violative of his constitutional rights.

The right to counsel is the most fundamental right that an accused possesses because it affects the assertion of all other rights he may have. Gideon v. Wainwright, 372 U.S. 344 (1963) Thus, it has long been held a tenet of our law that "a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 33 (1932) Underlying this tenet is the notion that the right to counsel contemplates a relationship between a defendant and his attorney that is defined by a degree of trust and confidence in that attorney such as to set it apart from ordinary relationships. In Matter of Dunn, 205 N.Y. 398, 401-02 (1912), the New York Court of Appeals in describing this relationship stated:

> "[T]hat the relationship between attorney and client is one of an unusual character has been so often affirmed that a statement of the proposition is commonplace. There lie at its foundation the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney which render the relationship a personal and confidential one and makes its obligations on the part of the attorney of the most exacting kind."

In this case, at the outset of the trial, it was clear that there was totally absent from appellant's relationship with Mr. Nathanson any semblance of those elements of trust and confidence that are the essential components of a proper attorney-client relationship. Yet, the Court summarily rejected appellant's request for counsel other than Mr. Nathanson. Although the Court gave appellant the option of proceeding pro se, appellant, recognizing his obvious lack of legal expertise, knew full well that he was not a match for the District Attorney. Nevertheless, because he felt so strongly that the crucial fiduciary relationship between himself and his attorney was lacking, he felt compelled to attempt to represent himself.

There is no question but that at this point had appellant been wealthy and felt that the necessary fiduciary relationship between his attorney and himself was absent, he in all probability would have been permitted to attempt to retain new counsel at the outset of the trial. In fact, the Court even questioned appellant as to whether he had funds to retain another lawyer.

Although there does not exist absolute parity between a wealthy defendant and one who is indigent with respect to the

the right to choose counsel, it may not be held that an indigent defendant who is assigned one attorney has absolutely no right to another when he establishes that he has no trust or confidence in that attorney. We have arrived at the point where an indigent defendant has a right to substantial equality in the criminal process - so that a claim otherwise valid bearing directly on the fundamental right of representation by counsel cannot and should not be denied solely because of his indigency. Anders v. California, 386 U.S. 738, 744 (1967); Douglas v. California, 372 U.S. 353 (1963); Ellis v. United States, 356 U.S. 674, 675 (1958).

Moreover, contrary to the trial Court's opinion and the attorney general's allegations, there is no proof in this record that appellant's application for a change of assigned counsel was made solely for the purpose of delay. As noted in the record, appellant had been assigned different Legal Aid counsel. Mr. Nathanson, who was assigned to represent him at trial, met with him for the first time only sixteen days before the trial. And it was at their few perfunctory meetings wherein appellant reached the conclusion that there was no rapport between himself and his attorney. Appellant evidently felt compelled to make the necessary motions in his case himself, for there is no indication that any of his Legal Aid counsel made any such motions. But even more important, there appeared to be a total lack of communication between Mr. Nathanson and appellant, since

Mr. Nathanson could not answer the questions posed by appellant about his case. And finally, in this regard, there is no indication on this record whether appellant had any prior opportunity to inform the Court of his dissatisfaction with his assigned counsel other than just before the trial was to commence. Hence, under these circumstances, appellant's request for a change of counsel cannot by any means be deemed a dilatory tactic.

Furthermore, the trial Court in denying appellant's application for a change of counsel also felt that it had no control over the Legal Aid Society and their method of assigning attorneys to a particular case. However, the Court did have the power to re-assign a new attorney under New York State's procedure for the assignment of counsel to indigent defendants (see New York County Law, Section 18B). And this is what the Court should have done. The District Attorney made no claim that their case would be prejudiced by the short delay that would result if another attorney were to be assigned, nor did they claim that any of their witnesses would be unavailable. Consequently, no valid reason existed in this record for the Court's refusal to permit appellant a change of assigned counsel.

In denying appellant the relief sought, the District Court in adopting the Magistrate's report found that appellant made no showing that his counsel was in any way ineffective. First, appellant is not relying on the line of cases which hold that there must be a showing of gross incompetence on the part of the attorney before relief will be granted. United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir., 1972); United States

ex rel. Testmark v. Vincent, 496 F.2d 641 (2d Cir., 1974); United States ex rel. Crispin v. Mancusi, 448 F.2d 233 (2d Cir., 1971); United States v. Wight, 176 F.2d 376 (2d Cir., 1949); United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y., 1971). Instead, the thrust of appellant's claim is that he should not have been forced to proceed to trial with an assigned counsel in whom he lacked complete trust and confidence. To compel him to proceed to trial with such an attorney undermines the very essence of the attorney-client relationship. And second, it is virtually impossible on this record for appellant to have made any showing of incompetency on the part of his assigned counsel. Other than to select a jury, his counsel did nothing for him. Appellant proceeded to trial pro se and cross-examined all of the Prosecution's witnesses himself. Only at the time of the summations, did his assigned counsel resume his duties as appellant's attorney. Moreover, the Court never questioned Mr. Nathanson as to what he or other Legal Aid counsel did with respect to this case.

Therefore, the summary denial of appellant's request for a change of assigned counsel constituted reversible error.

POINT II

THE COURT'S REFUSAL TO GRANT APPELLANT'S REQUEST TO RECALL THE PROSECUTION WITNESSES FOR FUTHER CROSS-EXAMINATION TOGETHER WITH THE COURT'S CURTAILMENT OF HIS SUMMATION DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

The most effective tool available to a defendant in a criminal trial is his right to confront and cross-examine the

witnesses against him. Pointer v. Texas, 380 U.S. 400 (1965); Davis v. Alaska, 415 U.S. 308 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931). While it is recognized that the extent of cross-examination rests within the sound discretion of the Court, it is submitted that in this case, the Court's refusal to permit appellant to recall the prosecution witnesses for further examination deprived him of his constitutional right to confront and cross-examine the witnesses against him. Smith v. Illinois, supra; United States v. Pacelli, 491 F.2d 1108 (2d Cir., 1974)

At the outset, it cannot be overlocked that appellant, a layman, was conducting his own cross examination. Therefore, under these particular circumstances, it was incumbent upon the Court to grant him a wide latitude in his cross-examination. The Court should not have conditioned his right of cross-examination on his first presenting proper questions to the Court. It is evident that appellant who was not versed in the art of cross-examination could not phrase his questions in a manner that would satisfy the Court. Accordingly, the Court found his questions irrelevant, improperly formed, or repetitive. The more appropriate procedure in a case of this nature would be to permit appellant to further cross-examine the witnesses against him and if his questions were improper, to then sustain any objections the People might have had.

Not only was appellant deprived of his right to thoroughly cross-examine the witnesses against him, but his counsel was

improperly precluded by the Court from making effective arguments in his summation. Counsel was directed outright by the Court not to comment on the presumption of innocence and reasonable doubt. This ruling without a doubt unduly prevented counsel from delivering an effective summation.

As appellant pointed out in his petition to the District Court, it was incumbent upon his counsel to point out to the jury that his arrest and subsequent indictment should not "place a stigma upon him" as he is in fact presumed innocent of any charges and it is the prosecution's duty to prove his guilt beyond a reasonable doubt. Such comments are not only proper subjects of a summation, but counsel would have been remiss in his duty if he did not discuss before the jury the application of the facts of the case in the context of the presumption of innocence and the reasonable doubt standard. The fact that these topics are also covered by the Court in its charge should in no way be construed as a restriction on a defendant's right to also comment upon these subjects in his crucial summation. The Court in its charge defines the meaning of the presumption of innocence and reasonable doubt as applied to the facts of the case. Its charge, of course, is supposed to be neutral and objective. Counsel, on the other hand, utilizes these concepts as an advocate, arguing that the People have not proved their case beyond a reasonable doubt and therefore his client remains cloaked with the presumption of innocence. Moreover, nowhere in Section 300.10 of the Criminal Procedure Law is it stated that because the

aforementioned topics are to be included in the Court's charge that counsel cannot also discuss these topics in his summation. The Court below therefore erred in concluding that the New York State procedure precludes a defendant from discussing topics that must be thereafter covered in the Court's charge.

Hence, coupling the refusal of the Court to permit appellant to recall the prosecution witnesses for further cross-examination with the Court's unreasonable restrictions on his counsel's summation, it must be concluded that appellant was denied his due process right to a fair trial.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

ROBERT LEIGHTON
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(212) CO7-6016

April , 1975

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE LASKER

Docket Sheets

75 CIV. 5306

Jury demand date:

D. C. Form No. 106 Rev.

FILED: 11/30/75

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel., GEORGE KING -V- SUPT. OSSINING CORRECTIONAL FACILITY, HON. THEODORE SCHUBIN	For plaintiff: George King # T P - 145 354 Hunter Street Ossining, N.Y., 10562
	For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed XX	Clerk			150		
J.S. 6 mailed ✓	Marshal					
Basis of Action: WRIT OF HABEAS CORPUS 28 USC 2241	Docket fee					
	Witness fees					
Action arose at:	Depositions					
		A-1				

G. KING -V- SUPT. OSSINING CORR. FACILI 73 Cr. 5806

JUDGE LASKER

DATE	PROCEEDINGS	Date Ord. Judgment
Dec.13,73	Filed petition for writ of habeas corpus.	
Dec.13,73	Filed order granting petitioner to proceed in forma pauperis.Frankel,J.	
Jan.9-74	Filed affidavit of Burton Herman in opposition to Petitoner's application for a writ of habeas corpus.	
Jan.28-74	Filed reply affidavit of petitioner to affidavit of respondent.	
Jan.28-74	Filed notice of assignment of this action to Lasker, J.	
Jan. 31-74	Filed memo endorsed--motion respectfully referred to Magistrate Charles J. Hartenstine of this Court for review and recommendation--Lasker,J.	
Oct 23-74	Filed Memo-End on back of petition for Writ of Habeas Corpus fld. 12-13-73.... ...The petition is dismissed...It is so ordered. Lasker, J. (Pro-Se to m/n)	
Oct 23-74	Filed Mag. Hartenstine's REPORT.	
Dec 13-74	Filed Notice of Motion by Pltff. for permission to appeal & assignmet of Counsel.	
Dec 13-74	Filed Memo-End on back of Motion filed 12-13-74...Certificate of propable cause granted. It is so ordered...Lasker, J. (Pro-Se Ck to m/n)	
Jan 30-75	Filed Memo-End on back of Pltff's Notice of Motion filed 12-13-74...Permission to proceed in forma pauperis is granted. It is so Ordered..LaskerJ.	
Jan 30-75	Filed Pltff's Notice of Appeal to USCA from an order dismissing his petition. .....Pro-Se Ck. mailed Notices to George King---& ---Hon. Louis J. Fefkowitz.	

A2

District Court's Decision

(73)

ENDORSEMENT

U.S.A. ex rel. GEORGE KING, Petitioner, v. HON. THEODORE SCHUBIN, Superintendent Ossining Correctional Facility, Respondent. 73 Civ. 5306

LASKER, D.J.

On this petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 it is claimed that 1) petitioner was denied effective assistance of counsel; 2) that the testimony of the witnesses was insufficient to support his conviction and 3) that he was denied a fair trial because (a) the court refused to permit him to recall certain witnesses for further examination and (b) refused to permit him to comment on the presumption of innocence and reasonable doubt in his summation to the jury.

Pursuant to 28 U.S.C. §636(b)(3) the petition was referred to Honorable Charles J. Hartenstine, a Magistrate of this court, for report and recommendation. In a detailed and thoughtful report dated October 11, 1974, the Magistrate recommends dismissing the petition as a matter of law without a hearing.

I have carefully reviewed the Magistrate's report as well as the transcript of trial and find that the petitioner's claims are without merit and that no evidentiary hearing is required under the provisions of 28 U.S.C. §2254 or Townsend v. Sain, 372 U.S. 293 (1963). The Magistrate's report includes a detailed exposition of the facts and law and is incorporated and annexed hereto.

On the basis of the report and of the trial record, I find that petitioner was 1) not denied effective assistance of counsel; 2) that the testimony of the witnesses was sufficient to support conviction and that, in any event, the insufficiency of evidence was not a question of constitutional magnitude and 3) that the defendant was not denied a fair trial since (a) the court did not exceed or abuse its discretion in refusing the recall of witnesses or (b) in refusing to permit the defendant to comment to the jury on legal matters particularly since the court itself did charge the jury on these subjects. The petition is dismissed.

It is so ordered.

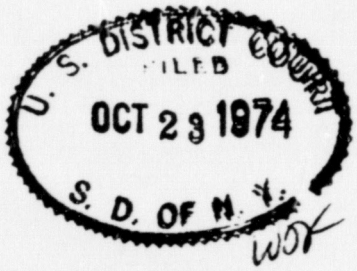
Dated: New York, New York
October 22, 1974.

Morris E. Lasker
U.S.D.J.

A-3

Magistrate's Report.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES, ex rel. GEORGE KING,

Petitioner,

-against-

THEODORE SCHUBIN, as Superintendent of Ossining Correctional Facility,

Respondent.

MAGISTRATE'S REPORT

Pro Se
73 Civ. 5306
(MEL)

This is a petition for a federal writ of habeas corpus by a state prisoner under 28 U.S.C. §2254. It was referred to the undersigned by Judge Lasker pursuant to 28 U.S.C. §636(b)(3) for preliminary review. Having studied the petition for the writ, the affidavit in opposition to the petition submitted on behalf of the respondent, with a copy of the transcript of the trial, and the petitioner's affidavit in reply, my recommendation is that the petition be dismissed as a matter of law, without a hearing.

A-4

Petitioner alleges, and it is undisputed, that he is in the custody of respondent in this district. (Petition, ¶2) Accordingly, this court has jurisdiction over the subject matter of this application under 28 U.S.C. §2241(d), which provides in pertinent part:

> "Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody...."

The basis for petitioner's custody is that on May 12, 1972, in Supreme Court of the State of New York, County of Kings, after trial to a jury before Justice Guy Mangano, petitioner was convicted of the crimes of attempted robbery in the second degree and attempted grand larceny in the third degree and was sentenced to a term of imprisonment not to exceed five years. (Petition, ¶8) The judgment of conviction was affirmed on appeal to the Appellate Division, People v. King, 41 A.D.2d 1027 (2d Dept. 1973), and leave to appeal to the Court of Appeals of the State of New York was denied. (Petition, ¶¶9-10) Accordingly, "it appears that the [petitioner] has

exhausted the remedies available in the courts of the State [of New York]," as required by 28 U.S.C. §2254(b).

In his petition for the writ, petitioner seeks to raise three issues:

1) Whether he was denied effective assistance of counsel when after the trial had commenced the court denied his request for assignment of another attorney;

2) Whether the testimony of the complaining witness and two police officers was sufficient to support his conviction after trial; and

3) Whether he was denied a fair trial when

(a) The court did not permit him to recall three witnesses for further cross-examination; and

(b) The court did not permit him in his summation to the jury to comment on the "presumption of innocence" and "reasonable doubt" under the law of New York.

No evidentiary hearing is needed to resolve these issues. Accepting the allegations in the petition as proved, petitioner has not established his right to release as a matter of law, and the writ should be denied. Townsend v. Sain, 372 U.S. 293 (1963).

1) Assistance of Counsel. Petitioner alleges that at the trial, following the prosecution's opening statement to the jury, he requested the court to assign another attorney to represent him. At that time he was represented by a staff attorney of the Legal Aid Society. Petitioner alleges that he informed the court:

> "This is real and I don't feel that the man is representing me properly." (Petition, p.3)
>
> "...I have only seen him about three or maybe on four occasions." (Ibid.)
>
> "...[H]e hasn't prepared no defense....I don't get no answers to none of the questions." (Ibid.)

The trial judge denied petitioner's request, saying:

> "At this point it is too late in the trial to now assign another lawyer. I have no reason for it. There has been nothing shown to me that he is incompetent. There has been nothing shown to me that he isn't protecting your legal rights and doing it in a proper manner at this stage, and as I say, the Court is of the opinion that this adjournment is sought only for the purpose of delay. The jury has been selected. We are going ahead with the trial." (Petition, p.4)

Petitioner then conferred with his assigned attorney. He informed the court that he would proceed pro se, with the assigned attorney available for any legal advice he might wish to have (Petition, p.11), but he asked that

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another Legal Aid lawyer be assigned to render the advice. (Petition, p. 12) The trial judge replied that he had no control over the Legal Aid Society's assignment of an attorney to a case. (Ibid.)

Opposing the petition, respondent asserts that the trial judge's decision not to assign another attorney to represent petitioner was a proper exercise of discretion. (Affidavit in opposition, p.2) Respondent points out that the request was made at trial and was unsupported by any showing (he says) that the attorney assigned to represent petitioner was not protecting his rights. (Id. at pp.1-2)

Under the Sixth Amendment, made applicable to the States by the Fourteenth, an indigent defendant charged in State criminal proceedings is entitled "to have the assistance of counsel for his defense." Gideon v. Wainwright, 372 U.S. 335 (1963). The legal assistance had must be effective. Powell v. Alabama, 287 U.S. 45 (1932).

Traditionally, to obtain relief in federal habeas corpus proceedings on a claim that he was denied effective assistance of counsel, the petitioner must show there was a

> "...lack of effective assistance of counsel... of such a kind as to shock the conscience of the [reviewing] Court and make the proceedings [under review] a farce and mockery of justice...."

United States ex rel Marcelin v. Mancusi, 462 F.2d 36, 42 (CA2 1972), quoting United States v. Wight, 176 F.2d 376, 379 (CA2 1949).

Under standards presently applied by federal courts in these matters a petitioner must show

> "...there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense ...." (Emphasis in original.)

United States ex rel. Testamark v. Vincent, 496 F.2d 641, 643 (CA2 1974).

In any event, determination of the effectivenss of counsel must proceed from an examination of the prosecution's case, Testamark, supra, at 643; Marcelin, supra, at 43; United States v. Katz, 425 F.2d 928, 930 (CA2 1970), and is limited to the character of the resultant proceedings, United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (CA2 1971); Wight, supra, at 379. Of course, the petitioner must show he was prejudiced by the lack

of effective counsel. Marcelin, supra, at 45, n. 14, citing Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L.Rev. 1434, 1435 (1965).

Here the record at trial shows the State's case was virtually impregnable. Petitioner was apprehended by two police officers while his hand was still caught in a taxi window that had been rolled up by the driver; the driver testified that petitioner had attempted to rob him through the window by putting a pistol to his head; and the pistol was found by the officers on the floor of the taxi where the driver said it had fallen from petitioner's hand. (Transcript, pp.27-28, 63-64, 73-74) Reviewing a similar record in Testamark, supra, the court observed that in circumstances such as these

> "...there is not too much the best defense attorney can do." 496 F.2d at 643.

Be that as it may, in neither the petition nor the transcript does petitioner specify any failing on the part of assigned counsel in presenting his defense. Apparently, when counsel waived making an opening statement, petitioner felt he was "showing no interest in the case" and simply had "no confidence in him" as an attorney.

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(Transcript, p. 16) But in choosing to wait and see how the State's case would unfold, defense counsel was acting well within the bounds of competence. United States ex rel. Crispin v. Mancusi, supra, at 237, citing Perrone v. United States, 416 F.2d 464 (CA2 1969).

As it happened, petitioner then undertook to conduct his own defense. This may not be equated with a denial of effective legal representation for two reasons. First, the record shows (and it is undisputed) that petitioner's request for assignment of another attorney was made after the jury had been selected and while the trial was in progress. (Petition, pp.2-3; Transcript, pp.2,8-13) At this point in the proceedings the trial judge was entirely justified in insisting that petitioner go on with the trial at once, with or without the lawyer who had been assigned to him. United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (CA2 1965).

Second, the record shows that petitioner was permitted to conduct his own defense only after the trial judge had inquired whether he wished to continue with

his assigned counsel or, in the alternative, proceed pro se. (Transcript, pp.14-15) At this point in the proceedings, when the case was on trial, the court was entirely justified in making this inquiry and in acting upon petitioner's decision. United States v. Abbamonte, 348 F.2d 700, 704 (CA2 1965).

United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (SDNY 1971), upon which petitioner relies, is readily distinguishable from this case. In Thomas a petition for a writ of habeas corpus was granted for denial of effective assistance of counsel. There the petitioner had urged upon his assigned counsel a line of defense, to be supported by the testimony of five prospective witnesses at trial. This court found that the suggested defense went to the heart of the State's case, 332 F. Supp. at 601, but that defense counsel had neglected to investigate the prospective witnesses, much less prepare them for trial. Id. at 600.

Here, in contrast to Thomas but like the appellant in Testamark, supra, 496 F.2d at 643, petitioner does not allege that there was a line of defense his counsel failed to develop, or that there were witnesses favorable to the

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defense his counsel should have called. Indeed, petitioner does not even allege that a defense was impaired by efforts, or the lack of them, on the part of his counsel. All he does, on the record before this court, is complain of a lack of frequent visitation by his assigned counsel and express a desire to have had other counsel assigned. Without more, these allegations taken as proved would not establish petitioner's right to release. Testamark, supra, 496 F.2d 641 (CA2 1974).

2) Sufficiency of Evidence. Petitioner alleges that cross-examination of the complaining witness "disclosed... weakness in his testimony." (Petition, p.6) He further alleges that testimony of at least one of the two arresting officers was "unbelievable." (Id. at pp.8-9)

In this habeas corpus proceeding sufficiency of the evidence is a question of state law and does not rise to the dimensions of a federal constitutional question unless there was no proof whatever of the crimes charged. United States ex rel. Terry v. Henderson, 462 F.2d 1125, 1131 (CA2 1972). Here the decision turns not on the sufficiency of the evidence but on whether the conviction for which petitioner is in custody rests upon any evidence at all. Thompson v. City of Louisville, 362 U.S. 199 (1960).

Petitioner was convicted of the crimes of attempted robbery in the second degree and attempted grand larceny in the third degree, committed on May 13, 1971. (Petition, pp.1-2) At that time, the Penal Law of the State of New York provided in pertinent part:

> "§160.10 Robbery in the Second Degree
>
> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> * * *
>
> 2. In the course of the commission of the crime...he...
>
> * * *
>
> (b) Displays what appears to be a pistol...."

> "§155.30 Grand Larceny in the Third Degree
>
> A person is guilty of grand larceny in the third degree when he steals property and when:
>
> * * *
>
> 5. The property, regardless of its nature and value, is taken from the person of another...."

> "§110.00 Attempt to Commit a Crime
>
> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

As indicated earlier in this report, the evidence at trial was ample to support a prima facie case as defined by these statutes. Petitioner was apprehended by two police

officers while his hand was still caught in a taxi window that had been rolled up by the driver; the driver testified that petitioner had attempted to rob him through the window by putting a pistol to his head; and the pistol was found by the officers on the floor of the taxi where the driver said it had fallen from petitioner's hand. (Transcript, pp.27-28, 63-64, 73-74) On this record, any claim there was no proof of the crimes charged and for which petitioner was convicted should be rejected as a matter of law. Terry, supra, 462 F.2d 1125 (CA2 1972).

3) Fair Trial. Petitioner alleges that he was denied a fair trial, because (a) the court did not permit him to recall three witnesses for further cross-examination (Petition, pp.18-21), and (b) the court did not permit him in summation to the jury to comment on the "presumption of innocence" and "reasonable doubt" under the law of New York. (Id. at pp. 16-18)

Opposing the petition, respondent asserts that the court's denial of further cross-examination was a proper exercise of discretion, and that petitioner was not denied

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a fair trial by being precluded from commenting on the law during summation. (Affidavit in opposition, p.2)

(a) Under the Sixth Amendment, made applicable to the States by the Fourteenth, an accused in State criminal proceedings has the right "to be confronted with the witnesses against him." Pointer v. Texas, 380 U.S. 400 (1965). This right is enforced against the States by the same standards that apply in federal criminal proceedings. Id. at 406.

A major reason underlying the constitutional right to confrontation is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. Id. at 406-407. The defendant must be given an opportunity to place the prosecution's witnesses in their proper setting and test the weight of their testimony and their credibility before the jury. Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931). Once the defendant has been afforded this opportunity, however, the extent of his cross-examination is within the sound discretion of the trial court. Smith v. Illinois, supra, at 132; United States v. Pacelli, 491 F.2d 1108, 1120 (CA2 1974).

Here, on the allegations in the petition (pp.18-19) and on the record at trial upon which petitioner relies (Transcript, pp.97-100), it is clear that the trial judge's decision, denying petitioner further cross-examination, was a proper exercise of discretion. Petitioner cross-examined the complaining witness, Pasquale Esposito (Transcript, at pp.32-61), and the two arresting officers, Detective Charles DiPiazza (id. at 71-72) and Detective Kenneth G. Sullivan (id. at 75-80). Thereafter, on three occasions he sought to recall one or more of these prosecution witnesses:

(i) Petitioner sought to recall Mr. Esposito during his cross-examination of Detective DiPiazza (id. at 71), but the court denied his request "at this time." (Id.at 72)

(ii) At the end of his own testimony petitioner again sought to recall Mr. Esposito, to put the following question:

> "Mr. Esposito, you claim to have been robbed with a revolver and I know the truth, and you need not fear repercussion if your answer is modified." (Id. at 95)

The court denied this request on the ground that "that is not a question but more a statement by the defendant." (Id. at 96)

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(iii) Following a weekend adjournment of the trial, petitioner sought to recall all three witnesses. He wished to ask "a few questions... before we sum up." (Id. at 97) Ruling on each proposed question, the court denied this request on the ground that they were concerned with subjects which had been covered or were irrelevant.

Except on two questions, which will be noted later, the transcript confirms the accuracy of the trial judge's view of the record:

Mr. Esposito. Petitioner wished to inquire concerning the direction Mr. Esposito took when he came off the bridge in Brooklyn, id. at 98 (covered, id. at 34-36); the lane Mr. Esposito was in going over the bridge to Brooklyn, id. at 98 (covered, id. at 35); which officer found the gun, id. at 98 (covered, id. at 38), and where, id.at 98 (covered, id. at 49); the route Mr. Esposito took to go over the bridge to Brooklyn, id. at 99 (covered, id. at 32-34); whether petitioner's hands were handcuffed in front or in back, id. at 98 (irrelevant); and who released petitioner's hand from the taxi window, id. at 98 (irrelevant).

Detective DiPiazza. Petitioner wished to inquire whether a police officer may keep a "firearm that expends ammunition" and "is involved in an attempted robbery" for "five days or more," id. at 99 (covered, id. at 71); whether the pistol received in evidence had ever been fired, id. at 99 (covered, id. at 71); whether the law requires a ballistics report and where is the one in this case, id. at 100 (irrelevant); where were Detective DiPiazza and Detecive Sullivan stationed when they followed Mr. Esposito's taxi, id. at 100; what mode of travel did the officers use to reach the point where they were stationed, id. at 100 (question would be "bad in form," ibid.); and whether petitioner was wearing glasses when he was arrested, id. at 100.

Detective Sullivan. Petitioner offered no proposed questions to Detective Sullivan.

As noted earlier, the trial judge's memory of the evidence was faulty on two questions. Cross-examination of Detective DiPiazza had not covered where he and Detective Sullivan were stationed when they followed Mr. Esposito's taxi, nor had it covered whether petitioner

was wearing glasses when he was arrested. But petitioner does not rely on these lapses. And the relevance of the questions seems tenuous at best. Accordingly, being well within the discretion of the trial court, all the proferred further cross-examination was properly rejected. United States v. Pacelli, 491 F.2d 1108, 1120 (CA2 1974).

(b) The record shows that during his cross-examination of Detective Sullivan, petitioner requested "that my counsel handle the case from this point on," and this request was granted. (Transcript, p.78) Petitioner alleges that during summation to the jury the trial judge directed his counsel not to comment on "presumption of innocence" and "reasonable doubt." (Petition, pp.16-17) This allegation is undisputed by respondent, and it is confirmed by the record at trial. (Transcript, pp. 104-106)

Accepting this allegation as proved, it is clear that the trial judge's direction to defense counsel not to comment on "presumption of innocence" and "reasonable doubt," reserving those subjects for his charge to the jury, was correct under the applicable New York law.

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On January 10, 1972, when these events occurred at trial, Section 300.10 of the Criminal Procedure Law provided in pertinent part:

> "1. At the conclusion of the summations, the court must deliver a charge to the jury.
>
> "2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt...." (Underlining added.)

Nevertheless, petitioner contends that his counsel "was warranted" in seeking to comment on these subjects, and that there "was no harm in defense counsel stressing" them. (Petition, p.16) He urges that defense counsel "has the right to call the jury's attention" to these subjects and in doing so "was not usurping the function of the court." (Id. at p.17) Petitioner concludes that the trial court

> "...was in error when it precluded defense counsel from giving his version of "presumption of innocence" and "reasonable doubt" based upon the evidence in the case." (Ibid.)

This contention should be rejected. The States are free to formulate procedural rules for the administration

of criminal justice, provided that the rules are not in violation of the Constitution. Burgett v. Texas, 389 U.S. 109 (1967). State prisoners are entitled to relief in federal habeas corpus proceedings when their detention is under rules constituting such a violation. Townsend v. Sain, 372 U.S. 293, 312 (1963). But the burden of showing the violation is on the petitioner. Buchalter v. New York, 319 U.S. 427 (1943).

On the record before this court, it seems to me the State procedure of which petitioner complains (i.e., Section 300.10 of the New York Criminal Procedure Law) cannot be condemned as denying petitioner a fair trial. It is not shown to violate any specific provision of the Constitution (e.g., right to counsel; right to confrontation). It is not shown to prejudice petitioner in submitting the case to the jury for determination. And finally, no showing is made that the procedure followed militates against the purpose of the trial, to provide a fair and reliable determination of guilt. Petitioner's conviction is not invalid on this ground. Cupp v. Naughten, 414 U.S. 141 (1973).

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Accordingly, no hearing is necessary on this petition, and the writ should be denied as a matter of law.

Dated: New York, N.Y.
October 11, 1974

Respectfully, submitted,

C J Hartenstine

Charles J. Hartenstine
United States Magistrate

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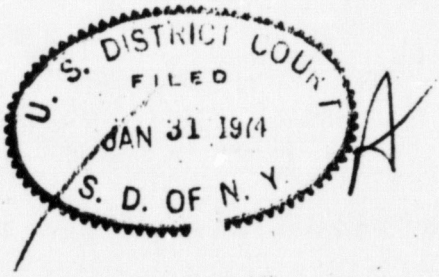
U.S.A. ex rel. GEORGE KING, Petitioner v. HON. THEODORE SCHUBIN, Superintendent Ossining Correctional Facility, Respondent. Pro Se 73 Civ. 5306

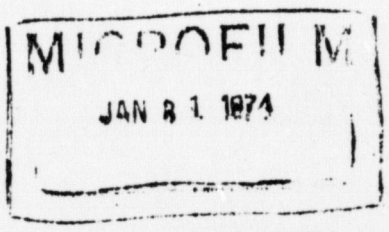
LASKER, D.J.

Respectfully referred to Magistrate Charles J. Hartenstine of this Court for review and recommendation.

Dated: New York, New York
January 30th, 1974.

U.S.D.J.





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UNITED STATES COURT OF APPEALS
for the Second Circuit

UNITED STATES OF AMERICA, ex rel. GEORGE KING, Prtitioner-Appellant, - *against* - HON. THEODORE SCHUBIN, etc., Respondent.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 8th *day of* May *19*75 *at* 2 World Trade Center, N.Y. N.Y.

deponent served the annexed Brief and Appendix *upon*

Louis J. Lefkowitz

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 8th
day of May *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James Steele

JAMES STEELE